



School of Law
UNIVERSITY OF GEORGIA

Prepare.
Connect.
Lead.

Journal of Intellectual Property Law

Volume 10 | Issue 1

Article 7

October 2002

Just Let the Music Play: How Classic Bootlegging Can Buoy the Drowning Music Industry

Dawn R. Maynor

Follow this and additional works at: <https://digitalcommons.law.uga.edu/jipl>

Recommended Citation

Dawn R. Maynor, *Just Let the Music Play: How Classic Bootlegging Can Buoy the Drowning Music Industry*, 10 J. INTELL. PROP. L. 173 (2002).

Available at: <https://digitalcommons.law.uga.edu/jipl/vol10/iss1/7>

This Notes is brought to you for free and open access by Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Journal of Intellectual Property Law by an authorized editor of Digital Commons @ University of Georgia School of Law. [Please share how you have benefited from this access](#) For more information, please contact tstriepe@uga.edu.

JUST LET THE MUSIC PLAY: HOW CLASSIC BOOTLEGGING CAN BUOY THE DROWNING MUSIC INDUSTRY

INTRODUCTION

Minneapolis, MN 1961. Tina Twirler and her best-friend-since third-grade Susie Spinner climbed noisily into Tina's VW and drove downtown. The girls had been looking forward to tonight's concert for weeks. Folk artist Bob Dylan was their favorite musician, and Susie had been fortunate enough to win two tickets in the local radio station's phone-in contest. The occasion was a special one because the following day, Tina was moving to California for college. Susie planned to stay in Minneapolis and keep her cashier job at the Safeway. She had saved her paychecks for the last month so she could treat her best friend to a nice dinner and the Dylan show before she moved away. The two friends could not have asked for a better performance. Dylan sang all of their favorite songs, and the girls danced and laughed until they were exhausted. The next day, as Tina shoved the last box of books into the crowded van, the two girls hugged each other tight, promised to always stay in touch, and Susie waved until Tina's blue Volkswagen went out of sight down the road.

Los Angeles, CA 1969. Tina "Marigold" Twirler wandered into a small record store and thumbed through the stacks of vinyl. She noticed an inauspicious white cardboard cover marked with the letters "GWW".

"What's this one?" she asked the man behind the counter.

"We just got that one in," the man replied. "Some live Dylan from back in '61 and, uh, Woodstock, I think."

"Could it be?" mused Tina, half under her breath. She emptied her purse, then ran outside and rifled through her van for spare change. Ten dollars seemed rather exorbitant for a record, but she just had to have it. She returned to the store, spread \$9.89 out on the sticker-covered counter, and smiled hopefully at the bearded storekeeper.

"Close enough," he said, handing her the album.

"Thanks, brother! Peace," Tina replied gratefully and hurried back to her room to play the record. Sure enough, part of the recording was the Minneapolis show she had attended with her long lost friend what seemed like a lifetime ago.

¹ Widespread Panic, *Don't Tell the Band*, DON'T TELL THE BAND (Sanctuary Records 2001). This song was conceived by guitarist Michael Houser, a founding member of Athens, Georgia's Widespread Panic, who lost his life to cancer at the age of forty in 2002. This Note is dedicated to his memory, and to the fans who will keep it alive.

Though the sound quality left much to be desired, she could not help but grin practically from ear to ear as the melody wafting from the hi-fi refreshed the evanescent memories of the show in her mind, transporting her back in time to that wonderful evening.

Lost in her reverie, Tina failed to notice that the "GWW" album bore no graphics, photos of Dylan, or a record company's mark of designation. She was just glad that someone had recorded the show, thereby allowing her to experience the show all over again.²

This Note revisits the federal anti-bootlegging provisions enacted by Congress in 1994 to combat the draining of revenue from the music industry by the widespread availability of bootleg recordings. Part I defines "classic" bootleg recordings, distinguishes this term from counterfeit and pirated recordings, and notes the sources of these recordings. Part II discusses the slow development of copyright protection for sound recordings in the United States. Part III describes the historical context of the anti-bootlegging legislation, specifically the Universal Copyright Convention, the Berne Convention, the Rome Convention, the Geneva Convention, the Uruguay Round of negotiations under the General Agreement on Tariffs and Trades ("GATT"), and the resulting Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS"). Part IV opens the author's analysis of the bootlegging issue by examining some of the constitutional conundrums arising from enactment of the federal scheme, particularly the Eleventh Circuit's decision in *United States v. Moghadam*.³ Part V continues by offering varied perspectives on the practice from music industry officials, artists and their legal counsel, music enthusiasts, and the bootleggers themselves. Part VI concludes with the author's determination that the music industry should use the sustained demand for bootlegged live recordings to its advantage. With the proliferation of online piracy in the last few years, the music industry now faces the destruction of the business model that has been its mainstay for almost a hundred years. Though the federal anti-bootlegging statute provides a means of suing and penalizing commercial bootleggers with large operations, industry enforcement efforts should be focused on the revenue-draining forms of music piracy since classic bootleggers provide a public service by archiving the fleeting moments of a live musical performance. Since the anti-bootlegging law has rather shaky constitutional underpinnings, and should *at least* be amended by Congress to remedy some of its defects; the music industry should take more aggressive steps to actually embrace bootlegging at the market level and use it to offset some of

² See generally Todd D. Patterson, Comment, *The Uruguay Round's Anti-Bootlegging Provision: A Victory for Musical Artists and Record Companies*, 15 WIS. INT'L L.J. 371 (1997) (recounting the appearance of "Great White Wonder" in Los Angeles record stores in 1969).

³ 175 F.3d 1269, 50 U.S.P.Q.2d (BNA) 1801, (11th Cir.) 1999.

the damage caused by online piracy. Artists should use the appeal of live bootlegs to their advantage and may find that the practice actually enlarges the market for their music, as well as ticket sales for their shows. It seems that the music industry is finally beginning to accept the fact that, illegal or not, bootlegs are here to stay. Some members of the business are using this fact as a means of boosting legitimate record sales. If other record company executives would follow suit, they may find the overall market for music augmented and the sting of online piracy diminished with the help of an unlikely accomplice: the music bootlegger.

I. MY BLUEST TAPE:⁴ WHAT BOOTLEGS ARE AND WHERE THEY COME FROM

The Supreme Court, in *Dowling v. United States*,⁵ described a "bootleg" phonorecord as one containing an "unauthorized copy of a commercially unreleased performance."⁶ Sources of these recordings vary from fan-recorded concerts or television appearances to studio "outtakes" not intended for release to the public that nonetheless end up in the public purview courtesy of some studio employee or custodian.⁷ The Recording Industry Association of America's ("RIAA") anti-piracy unit⁸ describes music piracy, in general, as "illegal duplication and distribution of sound recordings."⁹ Piracy traditionally takes three forms: counterfeit, pirate, and bootleg recordings. According to the RIAA, counterfeits are duplicates of commercially released albums, intended to look just like the original.¹⁰ Pirated recordings are the "unauthorized duplication of *only* the sound of legitimate recordings."¹¹ These recordings often take the form of compilations of selected songs from multiple albums.¹² Conversely, a bootleg recording is the unauthorized recording of an artist's live performance that has not been previously released.¹³ With the growth of the Internet, broadband, and sound technology over the last few years, a fourth category of music piracy has been added to the traditional list of three. Online piracy involves uploading a

⁴ Widespread Panic, *Driving Song*, WIDESPREAD PANIC (Capricorn Records 1991).

⁵ 473 U.S. 207 (1985).

⁶ *Dowling v. United States*, 473 U.S. 207, 209 n.2 (1985).

⁷ *Id.* at 210.

⁸ The Recording Industry Association of America ("RIAA") is a non-profit trade organization whose members represent ninety percent of all legitimate musical releases. See Part V, *infra* pp. 196-206 (discussing the RIAA).

⁹ What is Piracy?, at <http://riaa.com/Protect-Campaign-1.cfm> (last visited Sept. 1, 2002).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

copyrighted recording to make it available to the public, or downloading a recording from an Internet site.¹⁴ The RIAA is careful to point out that uploading or downloading music is unlawful copyright infringement, even if the recording is not sold or used for commercial gain.¹⁵ This fourth type of music piracy constitutes a major threat to the economic viability of the music industry in terms of traditional record sales, as well as to the protection that federal copyright law affords to musicians, producers, and record companies. According to the RIAA, manufacturers of music products shipped 10% fewer units (compact discs, videotapes, and digital videodiscs) in the first six months of 2002 than for the same period in 2001.¹⁶ Compact disc shipments dropped 7.2% in the first half of 2002, while confiscations of counterfeit and pirated discs increased by almost 70%.¹⁷ Though it is difficult to systematically evaluate these losses, since some portion of them may be related to vagaries in the number of releases and popularity of artists in the relevant time period, industry executives attribute the decline in sales largely to online piracy.

The RIAA's definitions are helpful in distinguishing among the forms of musical piracy, though they are often used inconsistently among lay persons. Furthermore, though they are not legal definitions, they are in accord with the Court's definition in *Dowling*,¹⁸ and with the rather broad definition of piracy contained in the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS") itself.¹⁹

The most accessible source of live material for bootleggers to exploit is amateur recordings of live concerts.²⁰ The typical means of obtaining these recordings involves surreptitious recording of the show from the audience using small microphones.²¹ A few recordings are obtained through a direct soundboard feed, sometimes with the assistance of the sound engineer (for a band that allows taping) and other times by unauthorized collusion with the sound engineer (for a band that prohibits it).²² As one would expect, such recordings are cherished by music collectors since soundboard mixes are generally of very high quality²³ (to

¹⁴ What is Piracy? at <http://riaa.com/Protect-Campaign-1.cfm> (last visited Sept. 1, 2002).

¹⁵ *Id.*

¹⁶ Jennifer Ordoñez, *Sales of Recorded Music Decline*, WALL ST. J., Aug. 27, 2002.

¹⁷ *Id.*

¹⁸ 473 U.S. 207, 209 n.2 (1985).

¹⁹ Article 51 in TRIPS explains that any unauthorized copying amounts to illegal piracy; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IC, legal instruments-Results of the Uruguay Round vol. 31; 33 I.L.M. 1197 (1997) [hereinafter TRIPS].

²⁰ Patterson, *supra* note 2, at 375.

²¹ *Id.*

²² *Id.* at 375 n.20.

²³ Patterson, *supra* note 2, at 375.

say nothing of the relative dearth of bootlegs with good sound quality). Examples of these highly collectible bootlegs include a series of "bettyboards" derived from mixes by Betty Cantor-Jackson, sound engineer for the granddaddy jam band Grateful Dead during the 1970s²⁴ and, more recently, the opening show of the "Sit-n-Ski" Tour performed by Athens, Georgia-based touring machine Widespread Panic in 1996.²⁵

The quality of bootlegs has improved tremendously since the days of "Great White Wonder," both in sound fidelity and packaging design. Though serious music fans had long collected and traded bootleg recordings through informal tape-trading exchanges,²⁶ the appearance of the compact disc ("CD") in the late 1980s brought bootleg recordings into many homes throughout the world.²⁷ Some bootlegs benefit from noise reduction technology and mastering,²⁸ and use of digital transfer ensures that there is no loss of fidelity from copy to copy.²⁹ Whether the sound quality is superb or sub-par (as is more often the case),³⁰ some bootlegs are packaged, designated "rare imports," and sold for around fifty dollars for a two-CD set.³¹

II. AN HONEST TUNE:³² THE DEVELOPMENT OF COPYRIGHT PROTECTION FOR SOUND RECORDINGS

Prior to 1970, sound recordings were completely unprotected by American copyright law.³³ The long and arduous road to copyright protection for sound recordings began with the powers granted to Congress in the United States Constitution to encourage the creation and dissemination of creative works by giving exclusive rights to authors for a limited period of time.³⁴ Musical

²⁴ *Id.* at 375 n.20.

²⁵ See Will Duckworth & Ted Rockwell, *Everyday Companion*, 224 (1997) (listing this show as a fan favorite after conducting a fan survey); the author is acquainted with several music collectors who prize this recording as one of the best in their collections.

²⁶ Patterson, *supra* note 2, at 376-77.

²⁷ Patterson, *supra* note 2, at 377.

²⁸ *Id.*

²⁹ David Schwartz, Note, *Strange Fixation: Bootleg Sound Recordings Enjoy the Benefits of Improving Technology*, 47 FED. COMM. L.J. 611, 615-16 (1995).

³⁰ See generally Robert M. Blunt, Comment, *Bootlegs and Imports: Seeking Effective International Enforcement of Copyright Protection for Unauthorized Musical Recordings*, 22 HOUS. J. INT'L L. 169 (1999) (discussing sound quality of bootleg recordings).

³¹ Patterson, *supra* note 2, at 373.

³² See *Driving Song*, *supra* note 4 (alluding to the smiling force of canines and cadence).

³³ See *infra* notes 56-57 and accompanying text.

³⁴ "Congress shall have the power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings

compositions were originally granted federal copyright protection in 1831, when a copyright holder received the right to sell a musical score from a particular work.³⁵ Protection of the composition itself was especially important at that time since several machines were invented between 1831 and 1909 that mechanically reproduced musical compositions.³⁶ Though the Supreme Court eventually held that the term "Writings" in the Copyright Clause was meant to include "any physical rendering of the fruits of creative, intellectual, or aesthetic labor,"³⁷ the early copyright statutes (1831 and 1909) protected against the "reproduction of musical notation (i.e. the composition as it appeared drawn out on a musical staff) but not against the reproduction of actual musical sound."³⁸

The distinction between musical notation and musical sound reproduction played a significant role in the development of copyright protection for music. In *White-Smith Music Publishing Company v. Apollo Company*, the Supreme Court grappled with sound reproduction technology when a copyright holder of musical scores and a music publisher sued a company that reproduced the copyrighted composition on player piano rolls.³⁹ The Court decided that the rolls were just pieces of equipment and not "copies" under copyright law so there was no infringement on the part of the defendant company.⁴⁰ Even though the piano rolls contained the composer's creative effort, the Court denied them copyright protection.⁴¹

Congress recognized the inadequacy of copyright protection and soon passed the Copyright Act of 1909. The 1909 Act allowed for "fixation" in copyright law, such that the copyright owner was allowed to choose the first person to archive the composition on a piano roll or phonorecord.⁴² Essentially, subsequent performers could lawfully record their own version of the musical work as long as they paid the requisite compulsory license fee.⁴³ Although the 1909 Act offered

and Discoveries." U.S. CONST. art. I, § 8, cl. 8. This portion of the Constitution is referred to as the Intellectual Property Clause and contains both the Copyright Clause and the Patent Clause.

³⁵ See *Goldstein v. California*, 412 U.S. 546, 562, 78 U.S.P.Q. (BNA) 129, 136 n.17 (1973) (recounting the history of copyright protection in the United States).

³⁶ *Id.* at 562-63 n.17.

³⁷ *Id.* at 561.

³⁸ David Schwartz, Note, *Strange Fixation: Bootleg Sound Recordings Enjoy the Benefits of Improving Technology*, 47 FED. COMM. L.J. 611, 624 (1995).

³⁹ 209 U.S. 1 (1908). Piano rolls are scrolls of paper marked with perforations. When air passes through these perforations, the keys of a player piano are activated to emit melodic sound. *Id.* at 10.

⁴⁰ *Id.* at 18.

⁴¹ *Goldstein*, 412 U.S. at 565.

⁴² Copyright Act of 1909, ch. 320, 35 Stat. 1075, superseded by Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-803 (2000)).

⁴³ See 17 U.S.C. § 115 (2000) (containing compulsory licensing requirements for making and distributing phonorecords).

greater protection for composers, it did not answer the question of whether someone could legally reproduce a copyright owner's performance by paying the rather nominal compulsory licensing fee instead of recording his or her own performance of the same composition.⁴⁴ Early evaluation of that question suggested that the answer was yes.⁴⁵

In 1970, the same question arose in *Duchess Music Corporation v. Stern*.⁴⁶ There, the defendant argued that her release of a compilation of multiple artists' work on cassette was legal because she paid the compulsory license fee and made a "similar use" of the protected matter, as the 1909 Act required.⁴⁷ The defendant reproduced the cassette in 25,000 copies.⁴⁸ The court determined that the defendant had not made a "similar use" of the artists' copyrighted material but instead had made "identical copies" of the protected work.⁴⁹ Thus, the pirated cassettes were deemed to stand outside the coverage of the compulsory licensing scheme.⁵⁰

Because the court had finally drawn a clear distinction between the copying of original performances and the creation of a new version by recording, copyright owners were afforded some protection against pirates and counterfeiters. The Ninth Circuit maintained this stringent position on copyright protection for music. In *United States v. Taxe*, the court determined that a compilation on eight-track tapes did not constitute "independent fixations" under the Copyright Act where the pirates had simply re-recorded previously released albums with minute variations from the original.⁵¹

The Supreme Court facilitated another advancement in the protection of sound recordings with its 1973 decision in *Goldstein v. California*.⁵² One question in that case was whether a state law that imposed harsher penalties on music pirates than those provided by the 1909 Act violated the Supremacy Clause of the Constitution.⁵³ *Goldstein* involved pirated compilations of various previously

⁴⁴ See *Shapiro, Bernstein & Co. v. Goody*, 248 F.2d 260, 262 (discussing the compulsory licensing system; performers were required to pay either two and three-fourths cents per copy or one-half of one cent per minute of playing time, whichever amount was larger); 17 U.S.C. § 115(c)(2) (2000).

⁴⁵ See, e.g., Melville B. Nimmer, *Photocopying and Record Piracy: Of Dred Scott and Alice in Wonderland*, 22 UCLA L. REV. 1052, 1060 (1975) (suggesting that a third party could duplicate original works by paying the compulsory licensing fee under the 1909 Act).

⁴⁶ 458 F.2d 1305 (9th Cir. 1972).

⁴⁷ *Id.* at 1310.

⁴⁸ *Id.* at 1307.

⁴⁹ *Id.* at 1310.

⁵⁰ *Id.*

⁵¹ 540 F.2d 961 (9th Cir. 1976).

⁵² 412 U.S. 546 (1973).

⁵³ The Supremacy Clause appears at U.S. CONST. art. VI, § 2.

released albums. The state of California charged the defendant pirates with criminal copyright infringement. In deciding that the state's penal code provisions did not violate the Supremacy Clause, the Court noted that copyright protection does not come under exclusive federal jurisdiction;⁵⁴ "under the Constitution, the States have not relinquished all power to grant to authors 'the exclusive Right to their respective Writings.'"⁵⁵

The debate over copyright protection for musical sound was finally settled by Congress when it amended the 1909 Copyright Act via the Sound Recording Act of 1971.⁵⁶ The Sound Recording Act became effective on February 15, 1972.⁵⁷ It extended federal protection to actual sound recordings apart from and in addition to that for the musical composition, as long as the originality and fixation requirements of the 1909 Act were met.⁵⁸ As meaningful as the Sound Recording Act was in protecting sound recordings, it did not apply to works recorded before February 15, 1972, many of which were by artists such as Bob Dylan and The Beatles, who ended up being among the most bootlegged artists of all time.⁵⁹

The Copyright Act of 1976 presently provides a copyright holder exclusive rights to copyrighted works, including: 1) the right to reproduce the work in copies i.e. phonorecords,⁶⁰ 2) the right to prepare derivative works i.e. works based on the original copyrighted work,⁶¹ and 3) the right to distribute the work.⁶² The 1976 Act does contain some exceptions to these rights, such as the compulsory licensing provision⁶³ and the fair use limitation.⁶⁴ Anyone who distributes copies of copyrighted sound recordings without authorization of the copyright holder may face up to five years in prison and fines reaching \$250,000.⁶⁵

Although the 1976 Act provided powerful protection from the distribution of pirate and counterfeit recordings, none of its original legislation worked to regulate the unlawful distribution of bootleg recordings. The 1976 Act had potential impact on those who bootlegged live performances in two respects. First, all exclusive rights under federal copyright law were made divisible.

⁵⁴ *Goldstein*, 412 U.S. at 558.

⁵⁵ *Id.* at 560.

⁵⁶ The Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391.

⁵⁷ *Id.* at 392.

⁵⁸ *Schwartz*, *supra* note 29, at 628; 17 U.S.C. § 102(a)(7) (2000).

⁵⁹ *See Patterson*, *supra* note 2, at 385 (noting the acts regarded as the most bootlegged artists of all time); according to *Hot Wacks*—a bootleg encyclopedia—as of 1992, 1400 Beatles bootlegs had been catalogued by collectors. *Schwartz*, *supra* note 29, at 616.

⁶⁰ 17 U.S.C. § 106(1).

⁶¹ 17 U.S.C. § 106(2) (2000).

⁶² 17 U.S.C. § 106(3).

⁶³ 17 U.S.C. § 115(a).

⁶⁴ 17 U.S.C. § 107. *See infra* note 156 and accompanying text (discussing the fair use doctrine).

⁶⁵ 17 U.S.C. § 506(a) (2000); 18 U.S.C. § 2319 (2000).

Consequently, record companies were in a position to prosecute bootleggers without the participation and/or consent of the artist whose performance was bootlegged. Second, since sound recordings had become the subject of federal protection, bootleggers faced the possibility of being under the surveillance of the Federal Bureau of Investigation.⁶⁶

Since the 1976 Act offered no true protection against bootleg recordings, artists and record companies who became aware of bootlegging operations were compelled to craft alternate means of curbing the process. In *Dowling v. United States*,⁶⁷ the Supreme Court determined that charging a bootlegger with transporting stolen goods in interstate commerce was one alternate means that would not withstand judicial scrutiny.⁶⁸ Paul Dowling allegedly spent about \$1000 each week for postage to send bootlegged Elvis Presley performances to customers throughout the country.⁶⁹ The Ninth Circuit upheld Dowling's conviction for mail fraud, interstate transportation of stolen goods, and conspiracy to transport stolen property interstate.⁷⁰ The Supreme Court held that the criminal penalty provisions of the National Stolen Property Act did not extend to the interstate transport of bootleg recordings: "[T]he property rights of a copyright holder have a character distinct from the possessory interest of the owner of simple 'goods, wares, [or] merchandise,' for the copyright holder's dominion is subjected to precisely defined limits."⁷¹

Because the defendant in *Dowling* had not stolen the bootlegs themselves (other than the fact that they were manufactured and distributed without the permission of the copyright holders for the musical compositions contained on them), he could not be penalized for violation of the National Stolen Property Act.⁷²

Justice Blackmun explained that Congress had not been clear in categorizing bootleg recordings as stolen property for purposes of the National Stolen Property Act. He compared Dowling's prosecution to an earlier case, *Harper & Row Publishers v. Nation Enterprises*.⁷³ There, a magazine called *The Nation* published excerpts from former President Gerald Ford's as yet unpublished memoirs without permission.⁷⁴ If Dowling could be convicted of interstate transportation of stolen goods in his case, then *The Nation* would have been guilty of the same

⁶⁶ Patterson, *supra* note 2, at 387 n.95.

⁶⁷ 473 U.S. 207 (1985).

⁶⁸ 473 U.S. 207.

⁶⁹ *Id.* at 212.

⁷⁰ *United States v. Dowling*, 739 F.2d 1445 (9th Cir. 1984), *rev'd*, 473 U.S. 207 (1985).

⁷¹ *Dowling*, 473 U.S. at 217.

⁷² *Id.* at 207. See also 18 U.S.C. § 2314 (1994) (detailing the National Stolen Property Act).

⁷³ 471 U.S. 539 (1985).

⁷⁴ *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 539-540 (1985).

offense for mailing its magazines to subscribers, even though the magazines themselves were not stolen.⁷⁵ The heart of the problem in *Dowling* was that the sound recordings at issue were not protected by copyright (because they were unreleased recordings of unprotected live performances) even though the musical compositions (i.e. the individual songs) they embodied were.⁷⁶

Although the United States stood at the fore in enhanced copyright protection for sound recordings, the rest of the world was not so inclined. The U.S. produces and uses more copyrighted works than any other country in the world.⁷⁷ The export value of American motion pictures is higher than that of American steel.⁷⁸ Music piracy alone is estimated to cause a loss of approximately \$300 million each year from the \$12 billion American recording industry,⁷⁹ so it is easy to understand why the United States had a peculiar interest in an effective international scheme of enforcement for music piracy.

Bootleggers soon moved their operations to countries such as Luxembourg and Germany in order to produce large quantities of bootlegs without concern for the disfavoring attitude of American courts.⁸⁰ Bootleg cassettes tended to be the format of choice since developing countries lacked technology to manufacture CDs in quantity.⁸¹ Bootleggers were quite efficient in their operations; some were able to distribute bootlegs with rapid ease. For instance, a Rolling Stones concert in Czechoslovakia was available on cassette at the band's next show the following evening.⁸² On July 13, 1985, several concerts were performed around the world under the collective title of "Live-Aid" in order to raise funds for famine relief.⁸³ The concerts' organizer, Bob Geldof, complained about the widespread availability of bootleg cassettes of the shows which cropped up quickly since the shows were the subject of live television and radio broadcasts.⁸⁴ The government of Indonesia, where the 1.5 million copies of Live-Aid on cassette were made, was indifferent to the manufacture of the illegal tapes, even though their dissemination

⁷⁵ *Dowling*, 473 U.S. at 226.

⁷⁶ *Id.* at 211 n.4.

⁷⁷ Patterson, *supra* note 2, at 388.

⁷⁸ *Id.*

⁷⁹ Jeanmarie LoVoi, Note, *Competing Interests: Anti-Privacy Efforts Triumph under TRIPS, but New Copying Technology Undermines the Success*, 25 BROOK. J. INT'L L. 445 (1999), citing Lauren Wiley, Bootleggers Turning to Burning: RIAA Says CD-R Piracy is on the Rise, EMedia Prof, June 1, 1998, available at 1998 WL 9595630.

⁸⁰ Patterson, *supra* note 2, at 389.

⁸¹ Schwartz, *supra* note 29, at 632.

⁸² *Id.* at 633.

⁸³ *Id.* at 632 n.135.

⁸⁴ *Id.*

quite literally took food out of the mouths of the famine victims the shows were intended to benefit.⁸⁵

Although worldwide copyright protection continues to be a struggle, international treaties and negotiations have established some degree of minimum protections. A series of treaties have governed international intellectual property rights.

III. THE RISE OF 17 U.S.C. § 1101

A. THE UNIVERSAL COPYRIGHT CONVENTION: TEMPORARY PROTECTION

The United States encouraged the formation of the Universal Copyright Convention ("U.C. Convention") after World War II as a temporary means of protecting U.S. copyright interests.⁸⁶ The current U.C. Convention was ratified in Paris on July 24, 1971 and became effective on July 10, 1974.⁸⁷ The convention states that works already published in member states and works to be published in member states are to enjoy the same protection in other member states as works published in those other member states would be granted.⁸⁸ The U.C. Convention failed to give complete copyright protection on an international scale because of difficulty in enforcement due to an expansion of music piracy in general (i.e., counterfeiting, piracy, and bootlegging) on the international scene.⁸⁹

Despite its shortcomings, the U.C. Convention may still provide some protection against music piracy in general and bootlegging in particular since almost two dozen nations are members of the U.C. Convention but not of the Berne Convention.⁹⁰

Since the United States withdrew from the United Nations' agency that oversees the U.C. Convention, the recording industry relies heavily on the Berne Convention for comprehensive copyright protection for sound recordings on an international scale.⁹¹

⁸⁵ *Id.* at 632.

⁸⁶ Robert M. Blunt, Comment, *Bootlegs and Imports: Seeking Effective International Enforcement of Copyright Protection for Unauthorized Musical Recordings*, 22 HOUS. J. INT'L L. 169, 175 (1999).

⁸⁷ *Id.* at 176.

⁸⁸ Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 132, revised by Universal Copyright Convention, July 24, 1971, 25 U.S.T. 1341, at 1345 [hereinafter U.C. Convention].

⁸⁹ Patterson, *supra* note 2, at 391.

⁹⁰ Blunt, *supra* note 87, at 177.

⁹¹ *Id.*

B. THE BERNE CONVENTION: MINIMUM STANDARDS

Before the adoption of TRIPS, the Berne Convention for the Protection of Literary and Artistic Works (1886)⁹² was the oldest multilateral copyright convention.⁹³ It established minimum standards of protection but had little effect in the area of piracy.⁹⁴ The Berne Convention did not offer copyright protection for musical compositions until its revision in 1971, and then it offered scant protection for sound recordings.⁹⁵ Another Berne Convention provision pertaining to music stated that authors of dramatic and musical works had the exclusive right of allowing for public performance of their work.⁹⁶

The Berne Convention was intended to provide a body of international law characterized by flexibility so that more nations would be inclined to join.⁹⁷ Consequently, it led to the creation of a "Union" of member nations for purposes of protecting authors and their literary and artistic works.⁹⁸ The treaty offers a system to be adopted by member states that includes an outline of measures to be taken in ensuring that the Berne Convention will function as intended.⁹⁹ Any nation may join the Berne Convention, but each is required to enact domestic legislation that meets the minimum standards created by the treaty.¹⁰⁰ Under the Berne Convention, authors are given ten intellectual property rights that are considered the general rights that authors should receive if their work is to hold value:¹⁰¹ "[M]oral rights, reproduction rights, translation rights, broadcasting and public communication rights, public recitation rights, adaptation rights, recording rights, cinematography rights, public performance rights, and the right of

⁹² Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised at* Stockholm, July 14, 1967, 331 U.N.T.S. 217, amended in Paris, July 24, 1971, 828 U.N.T.S. 221 [hereinafter *Berne Convention*].

⁹³ Blunt, *supra* note 87, at 177-78.

⁹⁴ See Patterson, *supra* note 2, at 395 (noting that neither sound recordings nor live performances are mentioned in the provision of the Berne Convention relating to protected works).

⁹⁵ *Id.* at 393 n.134.

⁹⁶ *Id.*

⁹⁷ Blunt, *supra* note 86, at 178.

⁹⁸ Berne Convention, *supra* note 93, at 221. See also Ann Moebes, *Negotiating International Copyright Protection: The United States and European Community Positions*, 14 LOY. L.A. INT'L & COMP. L.J. 301, 303 (1992) (discussing the Berne Convention and Union member positions on intellectual property issues).

⁹⁹ Blunt, *supra* note 86, at 178-79.

¹⁰⁰ Patterson, *supra* note 2, at 393.

¹⁰¹ Alexander A. Caviedes, *International Copyright Law: Should the European Union Dictate Its Development?*, 16 B.U. INT'L L.J. 165, 172 (1998).

pursuit.”¹⁰² In spite of this comprehensive list of intellectual property rights, the Berne Convention did not address music piracy at all.¹⁰³

The Berne Convention is under the auspices of the World Intellectual Property Organization (“WIPO”), in Geneva, Switzerland, for purposes of administration.¹⁰⁴ While its chief responsibility is to facilitate the protection of intellectual property,¹⁰⁵ the Berne Convention has been criticized for failure to require its members to enact law that truly enforces the protection of intellectual property rights.¹⁰⁶ Berne is tolerant of individual national approaches to intellectual property issues, and although it provides for the resolution of disputes between member states by the International Court of Justice, no case has been brought before that court.¹⁰⁷ Because of the treaty’s leniency, commercial infringements of intellectual property rights abounded in the 1980s and early 1990s, some of which constituted total breaches of the minimum standards of protection required by the treaty.¹⁰⁸

The United States joined the Berne Convention in 1988 when it enacted the Berne Convention Implementation Act.¹⁰⁹ Given the United States’ position as the world’s largest user and producer of copyrighted works,¹¹⁰ it was inevitable that the problems inherent in the Berne Convention would be of particular interest to this country.

C. THE ROME CONVENTION: PROTECTION FOR PERFORMANCES

In 1961, the International Convention on the Protection of Performers, Producers of Phonograms and Broadcast Organizations (popularly called the Rome Convention) broadened the rights granted by the Berne Convention by including musicians, record companies, and broadcast media.¹¹¹ The Rome Convention included the possibility of prevention of “the fixation, without their consent, of (his) unfixed performance,” and the reproduction of a phonogram by

¹⁰² *Id.* at 172 n.44.

¹⁰³ Patterson, *supra* note 96 and accompanying text.

¹⁰⁴ Blunt, *supra* note 86, at 180.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 181.

¹⁰⁷ *Id.* at 182.

¹⁰⁸ *Id.* at 181 (citing Laurence R. Helfer, *Adjudicating Copyright Claims under the TRIPS Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT’L L.J. 357, 375 (1998)).

¹⁰⁹ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

¹¹⁰ See Blunt, *supra* note 86, at 182 (pointing out the United States’ position as the biggest user and producer of copyrighted works in the world).

¹¹¹ International Convention for the Protection of Performers, Producers of Phonograms, and Broadcast Organizations, Oct. 26, 1961, 496 U.N.T.S. 43.

the performer and producer.¹¹² One commentator suggests that since the United States favors the idea of economic incentive as the rationale behind the copyright monopoly, it avoided the Rome Convention as it had refused to recognize the moral rights provision of the Berne Convention.¹¹³ At that time, the United States was one of several countries that did not legally protect an artist's live musical performance, even though it was one of the major creators and exporters of entertainment in the world.¹¹⁴ The United States found the minimum standards of the Rome Convention inadequate to protect American copyright owners in sound recordings¹¹⁵ and pushed for creation of a multilateral convention in the face of tremendous revenue loss due to piracy and other infringements.¹¹⁶

D. THE GENEVA CONVENTION: INTERNATIONAL PIRACY PROTECTION

The Geneva Copyright Convention of 1971¹¹⁷ offers international protection against the piracy of phonograms or phonorecords.¹¹⁸ Member states are required to offer national protection with minimum requirements such as a twenty-year minimum term.¹¹⁹ One commentator suggests that the United States gave up a better scheme of copyright protection by favoring the Geneva Convention over the Rome Convention, which covers performances, including those captured on sound recordings.¹²⁰

¹¹² *Id.* art. 7(1)(b); art. 10.

¹¹³ Patterson, *supra* note 2, at 396 n.154.

¹¹⁴ Susan M. Deas, *Jazzing up the Copyright Act? Resolving the Uncertainties of the United States Anti-Bootlegging Law*, 20 HASTINGS COMM. & ENT. L.J. 567, 579 (1998).

¹¹⁵ See Jerry D. Brown, *U.S. Copyright Law After GATT: Why a New Chapter Eleven Means Bankruptcy for Bootleggers*, 16 LOY. L.A. ENT. L.J. 1, 9-15 (1995) (noting that bootlegging is of special concern for the United States because the exportation of American music is one of few positive American trade balances).

¹¹⁶ Marshall Leaffer, *Protecting United States Intellectual Property Abroad: Towards a New Multilateralism*, 76 IOWA L. REV. 273, 298 (1994).

¹¹⁷ Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, Oct. 29, 1971, 25 U.S.T. 309, 866 U.N.T.S. 67 [hereinafter Geneva Convention].

¹¹⁸ Leaffer, *supra* note 116, at 324; 866 U.N.T.S. at 72. "Phonograms" are defined as "any exclusive aural fixation of sounds of a performance or other sounds." *Id.*

¹¹⁹ Blunt, *supra* note 86, at 185.

¹²⁰ Patterson, *supra* note 2, at 397.

E. GATT AND TRIPS: FIXATION OF PERFORMANCES, OUTTAKES, AND BROADCASTS PROHIBITED

The Agreement on Trade Related Aspects of Intellectual Property Rights¹²¹ ("TRIPS") was sparked by concern for the many problems in the interconnectedness of intellectual property and international trade.¹²² The widespread availability of bootleg recordings left artists with little incentive to engage in development of musical projects that may not succeed economically or be protected by adequate enforcement of intellectual property rights.¹²³ Some recordings left the artist with no profits at all, and ultimately the production of legitimate recordings decreased, as did overall international trade.¹²⁴

One provision of TRIPS concerned bootleg recordings in particular: "In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation."¹²⁵ Though this language is almost identical to that used in the Rome Convention which the United States did not join, some suggest that this implies an affirmative property right that goes beyond the subjects of the Rome Convention.¹²⁶ Thus it appears that TRIPS prohibits recording live performances or the release of studio outtakes,¹²⁷ as well as the fixation of broadcasts.¹²⁸ Section 5 of Article 14 of TRIPS extends protection of performance, production, and broadcast rights for fifty years after the performance.¹²⁹

To combat its own concerns regarding bootleg recordings, the United States moved for placing TRIPS on the agenda of the Uruguay Round.¹³⁰ On April 15, 1994 in Marrakesh, Morocco, the United States and 110 other nations signed the

¹²¹ Agreement on Trade Related Aspects of Intellectual Property Rights, Dec. 15, 1993, World Trade Organization, Annex IC, legal instruments—Results of the Uruguay Round vol. 31; 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement] (resulting from the negotiations under the General Agreement on Tariffs and Trade ("GATT"), an international arrangement under which almost eighty nations negotiated norms for international trade). See also Blunt, *supra* note 86, at 186 n.114 (discussing GATT and TRIPS).

¹²² Linda W. Tai, *Music Piracy in the Pacific Rim: Applying a Regional Approach Towards the Enforcement of International Conventions*, 16 LOY. L.A. ENT. L.J. 159, 163-67 (1995).

¹²³ *Id.* at 159.

¹²⁴ Leaffer, *supra* note 116, at 277.

¹²⁵ TRIPS Agreement, *supra* note 121, at 88.

¹²⁶ See Deas, *supra* note 114, at 587.

¹²⁷ Schwartz, *supra* note 29, at 636.

¹²⁸ *Id.* at 636-37.

¹²⁹ TRIPS Agreement, *supra* note 121, at 68.

¹³⁰ David Nimmer, *The End of Copyright*, 48 VAND. L. REV. 1385, 1390-91 (1995).

Final Act embodying the results of the Uruguay Round of Multilateral Trade negotiations.¹³¹

Regarding international copyright, TRIPS incorporated the mandates of the Berne Convention and established its own rights and standards.¹³²

F. THE URAA: CIVIL AND CRIMINAL PENALTIES

In keeping with Article 14 of TRIPS, sections 511 and 512 of the Uruguay Round Agreements Acts ("URAA") set forth civil and criminal penalties under the federal scheme for unauthorized fixation and "trafficking in"¹³³ sound recordings and music videos of live musical performances.

As a result of the adoption of the URAA in December 1994, the United States Congress extended federal protection against bootlegging to live performers for the first time in history.¹³⁴ Although numerous states had enacted state law protections,¹³⁵ there was no uniform federal protection against unsanctioned fixation of live musical performances before the adoption of the URAA. The anti-bootlegging provisions of the URAA protect only live musical performances.¹³⁶ Performers are granted the right to control the fixation of their performances, along with any reproduction of those fixations and their distribution or subsequent communication to the public.¹³⁷ Section 512 also

¹³¹ Patterson, *supra* note 2, at 403.

¹³² *Id.* at 404.

¹³³ Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) [hereinafter URAA]; under section 512 of URAA, to "traffic in" is defined as to "transport, transfer, or otherwise dispose of, to another, as consideration for anything of value or make or obtain control of with intent to transport, transfer, or dispose of." URAA at § 512 (creating 17 U.S.C. § 1101).

¹³⁴ Patterson, *supra* note 2, at 407-08.

¹³⁵ The U.S. Department of Justice says that forty-five states have "true name and address" statutes. These laws require distributors of sound recordings to print the name and address of the producer and distributor on the label. See http://www.doj.gov/criminal/cybercrime/intell_prop_rts/app_l-.htm (discussing state law protections against intellectual property crimes). In New York, failure to disclose the origin of a sound recording is a felony offense if more than 1,000 copies of a sound recording or one hundred copies of an audiovisual recording are involved. If fewer recordings are involved, the offense is a misdemeanor. N.Y. PENAL LAW § 275.40 (McKinney 1999), 275.35 (McKinney Supp. 1999). In 1997, a concerted effort from a New York District Attorney's office and RIAA investigators resulted in the seizure of 3,500 bootleg CDs and hundreds of bootleg videos of live shows. The offenders were prosecuted under New York's "true name and address" statute. Michael Coblenz, *Intellectual Property Crimes*, 9 ALB. L.J. SCI. & TECH. 235, 268-69 (1999).

¹³⁶ Doris E. Long, *Copyright and the Uruguay Round Agreements: A New Era of Protection or an Illusory Promise?*, 22 AIPLA Q.J. 531, 568 (1994).

¹³⁷ *Id.*

includes the stipulation that the fixation does not have to occur in the United States.¹³⁸

Further, section 512 recognizes the important role that state law has played in curbing bootlegging and provides that the URAA's anti-bootlegging provisions do not preempt any remedies available to artists under state common law or statutory law.¹³⁹

Besides various criminal penalties, the URAA also requires that once a bootlegger is convicted, all infringing copies as well as "any plates, molds, matrices, masters, tapes, and film negatives by means of which such copies or phonorecords may be made" be forfeited and destroyed.¹⁴⁰ The URAA also instructs the Secretary of the Treasury to promulgate regulations allowing for seizure of unauthorized bootlegs by United States Customs Service officials and to allow artists to register with Customs so that they may be notified of the seizure of any copies that appear to infringe their rights under the Act.¹⁴¹

G. 17 U.S.C. § 1101: FEDERAL BOOTLEGGING PROHIBITION

Subsequent modifications to U.S. copyright law were based on TRIPS and section 512 of the URAA. The resulting statute was the first federal anti-bootlegging statute, and is now codified at 17 U.S.C. § 1101.¹⁴²

¹³⁸ *Id.*

¹³⁹ URAA, *supra* note 133, at § 512; this section states that "nothing in this section may be construed to annul or limit any rights or remedies under the common law or statutes of any state."

¹⁴⁰ Long, *supra* note 136, at 569.

¹⁴¹ *Id.* at 570.

¹⁴² Patterson, *supra* note 2, at 408-09; 17 U.S.C. § 1101(a) (1994) provides:

Anyone who, without the consent of the performer or performers involved 1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation, 2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance, or 3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States, shall be subject to [specified penalties].

See also 18 U.S.C. § 2319(a) (1994) (criminalizing the unsanctioned recording of and trafficking in live performances).

IV. CONSTITUTIONAL CONUNDRUMS

A. COPYRIGHT CLAUSE QUANDARIES

The federal anti-bootlegging scheme raises some interesting constitutional questions. Since it extends protection to unfixed live musical performances, section 1101 covers works that would not have met the constitutional “writings” requirement for copyright protection.¹⁴³ By their very nature, live performances are not fixed in a tangible medium of expression. This fact led some commentators to question whether the constitutional basis for section 1101 could in fact be the Copyright Clause.¹⁴⁴

In addition to the “writings” requirement, the protection extended under section 1101 states no specific duration of the term of protection. This would seem to mean that the protection has a potentially unlimited duration, and thus would be contrary to the “Limited Times” restriction on grants of copyright protection described in the Copyright Clause.¹⁴⁵

One writer has suggested three possible solutions to the “Limited Times” issue: 1) application of existing copyright duration provisions for the performer’s rights in a live musical performance; 2) application of section 301¹⁴⁶ to fixations of live performances; and 3) application of Article 17(1) of the 1996 WIPO Treaty, which required a fifty-year term of protection from the end of the year in which fixation occurs.¹⁴⁷ A related inquiry is whether any statute of limitations applies to section 1101 remedies against those who engage in activities described in 18 U.S.C. 2319(A), i.e. selling, renting, or otherwise trafficking in bootleg recordings.¹⁴⁸ According to commentator Susan Deas, if section 1101 remains unaffected by a statute of limitations, its time limit on remedies would be the same as that for murder.¹⁴⁹ It is unlikely that Congress intended this perpetual

¹⁴³ U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

¹⁴⁴ Nimmer, *supra* note 130, at 1410.

¹⁴⁵ *Id.* at 1399-1400 (citing 17 U.S.C. § 1101).

¹⁴⁶ See 17 U.S.C. § 301 (pre-empting state copyright protections in favor of uniform federal protection). Section 301(b)(1) provides however that “[n]othing in [the Copyright Act] annuls or limits any rights or remedies under the common law or statutes of any State with respect to . . . subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103” If live musical performances are not the proper subject of copyright protection, state statutes or common law standards could specify a length of time for their protection.

¹⁴⁷ Deas, *supra* note 114, at 588.

¹⁴⁸ *Id.* at 580.

¹⁴⁹ *Id.*

availability of remedies; rather the questions left open by section 1101 are likely the result of faulty drafting in the rush of implementation of the URAA.¹⁵⁰

B. FIRST AMENDMENT WOES

Section 1101 also raises First Amendment issues, particularly in its lack of an affirmative defense for acts under section 1101 that amount to fair use¹⁵¹ of a live musical performance.¹⁵² Since fair use does not appear to be a defense to bootlegging under section 1101, the statute could be held to infringe First Amendment free speech rights. The fair use doctrine allows courts to uphold copyright law against free speech challenges. The lack of a fair use defense in section 1101 is a deficiency that Congress must remedy to avoid challenges on a First Amendment basis in the future.¹⁵³

Since the protection granted to artists under the anti-bootlegging statute does not appear to be absolute, their rights may be limited by the First Amendment's protection of speech. According to William Patry, section 512 of the URAA (and its United States progeny section 1101) contain rights that are granted under the Commerce Clause of the Constitution, not under the Copyright Clause.¹⁵⁴ Section 512 of the URAA indicates that bootleggers "shall be subject to the remedies provided in Sections 502 through 505 (of Title 17), *to the same extent as an infringer of copyright*" (emphasis added).¹⁵⁵ Since the anti-bootlegging protections arise under the Commerce Clause and not the Copyright Clause, the "fair use" doctrine¹⁵⁶ and the statutory preemption¹⁵⁷ of the 1976 Copyright Act do not apply. There may be an exemption under the First Amendment if the performance qualifies as protected speech. In enacting the anti-bootlegging legislation, Congress did note that the law would "not apply in cases where First Amendment principles are implicated."¹⁵⁸ The Senate noted that small portions of an

¹⁵⁰ *Id.*

¹⁵¹ See 17 U.S.C. § 107 (2000), *infra* note 158 and accompanying text.

¹⁵² Deas, *supra* note 114, at 580.

¹⁵³ *Id.* at 580.

¹⁵⁴ WILLIAM F. PATRY, COPYRIGHT AND THE GATT: AN INTERPRETATION AND LEGISLATIVE HISTORY OF THE URUGUAY ROUND AGREEMENTS ACT, 18 (1995).

¹⁵⁵ Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

¹⁵⁶ "[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords . . . for purposes such as criticism, comment, news reporting, teaching . . . is not an infringement of copyright." The inquiry into whether a use is "fair" should consider "the purpose and character of the use," "the nature of the copyrighted work," the amount of the work used in relation to the whole, and "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107 (1994).

¹⁵⁷ 17 U.S.C. § 301 (2000). See *supra* note 146 (discussing statutory preemption).

¹⁵⁸ S. Rep. No. 103-412, at 3 (1994).

unauthorized fixation used in a news broadcast or for other purposes of comment or criticism would be an example of an exempt use under the First Amendment.¹⁵⁹ It seems clear that such uses would qualify as de minimis uses, but that begs the question of whether a First Amendment exemption should be implicitly recognized, and, if so, how broad that exemption should be.

C. THE TEST CASE

In 1999, the Eleventh Circuit had the opportunity to address some of the constitutional issues raised by section 1101 in the first case to challenge its constitutionality. Ali Moghadam was arrested during Operation Goldmine, a sting operation aimed at the capture of key individuals involved in the underground music bootleg industry.¹⁶⁰ Undercover agents set up a meeting between eleven international and American bootleggers and a record distributor from Orlando, Florida.¹⁶¹ When the bootleggers arrived, they were arrested by United States Customs Service officials.¹⁶² The sting resulted in the seizure of more than 800,000 illegal CDs from warehouses in Orlando. These albums were largely attributed to Tori Amos and the Beastie Boys, and had a street value of \$20 million.¹⁶³

Moghadam challenged the constitutionality of his conviction under 18 U.S.C. § 2319A.¹⁶⁴ He alleged that the statute under which he was convicted was unconstitutional in that it did not fall within any of the federal legislative powers enumerated in Article I, § 8 of the Constitution.¹⁶⁵ After an examination of the background of the anti-bootlegging statute, the court observed that the rights created by the anti-bootlegging provisions were actually related rights that were similar to copyright law but more accurately described as “‘quasi-copyright’ or sui generis protection.”¹⁶⁶ While the copyright owner has six exclusive rights under 17 U.S.C. § 106, the only exclusive right created by the anti-bootlegging statute is that of recording or re-communicating a live musical performance.¹⁶⁷ The

¹⁵⁹ *Id.*

¹⁶⁰ Keith V. Lee, Note, *Resolving the Dissonant Constitutional Chords Inherent in the Federal Anti-Bootlegging Statute in United States v. Moghadam*, 7 VILL. SPORTS & ENT. L.J. 327, 330 n.19 (2000).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *United States v. Moghadam*, 175 F.3d 1269, 1271, 50 U.S.P.Q.2d (BNA) 1801, 1803 (11th Cir. 1999), *cert. denied*, 529 U.S. 1036 (2000).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1273. See also Steven M. Szczepanski, updated by David M. Epstein, *Eckstrom's Licensing in Foreign and Domestic Operations*, 4.05A (1999) (abstracting the *Moghadam* opinion).

¹⁶⁷ Szczepanski, *supra* note 166.

Eleventh Circuit continued in *Moghadam* with an analysis of the Copyright Clause and whether the statute in question could be sustained under its authority.¹⁶⁸ Moghadam relied only on the limitation expressed by the "Writings" requirement in the Constitution's Copyright Clause.¹⁶⁹ The concept of a "Writing" suggests that the protected matter must be expressed in a material form with some degree of permanence.¹⁷⁰ The concept that copyright protection is given only to works that have been "fixed" in a tangible medium of expression is bolstered by two hundred years of jurisprudence and legislative interpretation.

Though the concept of a "Writing" has been expanded to include a sound recording¹⁷¹ in response to technological advances, the fixation requirement remains intact. The Supreme Court has also considered whether recordings of musical shows are protected under the Copyright Clause.¹⁷² Moghadam argued that a live performance had not been reduced to a tangible form and that but for the bootlegger's decision to record the show, the performance would remain unfixed and therefore unprotected.¹⁷³

The court noted in dictum that this problem with satisfaction of the fixation requirement would preclude use of the Copyright Clause as the source of Congressional power for passage of the anti-bootlegging statute.¹⁷⁴

The court continued its analysis of Moghadam's conviction in examining the Commerce Clause of the Constitution as an alternative source of Congressional authority for implementation of the anti-bootlegging provision.¹⁷⁵ The Constitution states that Congress has the legislative authority "to regulate Commerce with foreign Nations, and among the several States."¹⁷⁶ The Commerce Clause gives Congress power to legislate regarding: (1) use of channels of interstate commerce, (2) instrumentalities and persons or things in interstate commerce, and (3) intrastate activities that substantially affect interstate commerce.¹⁷⁷

¹⁶⁸ *Moghadam*, 175 F.3d at 1273.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* See also Melville B. Nimmer & David Nimmer, 1 *Nimmer on Copyright* § 1.08[c][2], at 1-66.40 (2001) (discussing the "Writings" requirement).

¹⁷¹ *Shaab v. Kleindienst*, 345 F. Supp. 589, 590, 174 U.S.P.Q. (BNA) 197, 197-98 (D.D.C. 1972) (per curiam).

¹⁷² *Goldstein v. California*, 412 U.S. 546, 561-62, 178 U.S.P.Q. (BNA) 129, 136-38 (1973). In *Goldstein*, petitioners illegally copied and distributed tapes of popular musical concerts. 412 U.S. 546 at 549-50. The Court concluded that the term "Writing" may be interpreted to include "any physical rendering of the fruits of creative intellectual or aesthetic labor" *Id.* at 561. This suggests that "fixation" occurs at the moment when the "Writing" is reduced to a tangible medium.

¹⁷³ *Moghadam*, 175 F.3d 1269, 1274.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ U.S. CONST. art. I, § 8, cl. 3.

¹⁷⁷ *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

In examining 2319A (the criminal code's counterpart to section 1101), the test was whether a "rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce."¹⁷⁸ Although section 1101 is not based on any particular legislative findings¹⁷⁹ and lacks a jurisdictional element that might assist the court in evaluating the statute's validity under the Commerce Clause,¹⁸⁰ the court concluded that section 2319A clearly prohibited conduct that bore a substantial effect on interstate commerce since by its very nature, bootlegging is done "for purposes of commercial advantage or private financial gain."¹⁸¹ The court relied on the underlying purpose of Congress in enacting the statute (i.e., compliance with an international treaty intended to provide uniform global protection of valuable intellectual property rights) and determined that "the link between bootleg compact discs and interstate commerce and commerce with foreign nations is self-evident."¹⁸²

The court proceeds with an analysis of a possible tension between upholding the anti-bootlegging statute under the Commerce Clause and some case law¹⁸³ which supports the notion that the Commerce Clause cannot be used by Congress to eliminate a limitation placed upon Congress in another constitutional grant of power.¹⁸⁴ The court artfully dodges this potential pitfall by noting that the Copyright Clause does not positively forbid Congress from extending copyright-like protection under other constitutional grants of authority (like the Commerce Clause) to works that might not satisfy the fixation requirement of the term "Writings."¹⁸⁵ The court explained that it follows that extending quasi-copyright protection to unfixed live musical performances is not inconsistent with

¹⁷⁸ *Id.* at 557.

¹⁷⁹ *See id.* at 562-63 (observing that Congress does not have to make "formal findings as to the substantial burdens that an activity has on interstate commerce" but that such findings would allow the court to "evaluate the legislative judgment that the activity in question substantially affected interstate commerce . . .").

¹⁸⁰ *See id.* at 562 (observing that the statute under scrutiny did not include an "express jurisdictional element which might limit its reach to [activities] . . . hav[ing] an explicit connection with or effect on interstate commerce"); *Lee, supra* note 160, at 352.

¹⁸¹ *Moghadam*, 175 F.3d 1269, 1276; *see also* 18 U.S.C. § 2319A(a) (1994) (outlining U.S. prohibition on commercial distribution of unauthorized recordings of live musical performances).

¹⁸² *United States v. Moghadam*, 175 F.3d 1269, 1276, 50 U.S.P.Q.2d (BNA) 1801, 1805 (11th Cir. 1999), *cert. denied*, 529 U.S. 1036 (2000).

¹⁸³ *See, e.g., Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 471-73 (1982) (evaluating statute that conflicted with the Bankruptcy Clause's uniformity requirement and holding that the statute could not be upheld as constitutional). "[I]f we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws." *Id.* at 468-69.

¹⁸⁴ *Moghadam*, 175 F.3d at 1279-80.

¹⁸⁵ U.S. CONST. art. I, § 8, cl. 8.

the Copyright Clause.¹⁸⁶ The court goes so far as to say that extending this protection *complements* existing copyright law since a live musical performance satisfies the originality requirement and because extending quasi-copyright protection fosters the purpose of the Copyright Clause to promote the arts.¹⁸⁷

In regards to the fixation requirement (the basis for Moghadam's challenge), the court noted that "although a live musical performance may not have been fixed, or reduced to tangible form, as of the time the bootleg copy was made, it certainly was subject to having been thus fixed."¹⁸⁸ The court finds support for this conclusion in an example from existing copyright law.¹⁸⁹ The court suggests that the incorporation of this fiction into existing copyright law suggests that the fixation requirement is not a "rigid, inflexible barrier" to the power of Congress.¹⁹⁰ If a performer could have protected a live musical performance under existing copyright law merely by simultaneously recording the show, then it follows that extending copyright-like protection to such a performance is not inconsistent with the Copyright Clause.¹⁹¹

The court notes that the "Limited Times" provision of the Copyright Clause may also be implicated by the anti-bootlegging statute, but does not decide whether extending copyright-like protection under it might be inconsistent with the "Limited Times" provision because Moghadam did not raise the issue in the appeal.¹⁹² It seems certain that this question will give rise to some future challenge to section 1101 and its criminal counterpart, section 2319A, but the case has not come up yet.¹⁹³

In handing down its decision in *Moghadam*, the Eleventh Circuit was the first court to uphold copyright legislation that exceeds the Copyright Clause's authority under the Commerce Clause.¹⁹⁴ This holding has its critics, since it gives rise to the notion that any copyright legislation could find support under the Commerce Clause, which might obviate the need for the Copyright Clause and run afoul of

¹⁸⁶ *Moghadam*, 175 F.3d at 1280.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ The last sentence of the definition of "fixed" in 17 U.S.C. § 101 states that "[a] work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission." The Eleventh Circuit observed that this definition gives rise to a legal fiction that the work becomes "fixed" in the simultaneous fixation before the transmission and unauthorized recording. *Moghadam*, 175 F.3d 1269, 1280-81 (1999).

¹⁹⁰ *Moghadam*, 175 F.3d 1269, 1281 (1999).

¹⁹¹ *Id.* at 1281.

¹⁹² *Id.* at 1281 n.15.

¹⁹³ *Appeals Court Backs Anti-Bootlegging Statute*, 15 No. 3 ENT. L. & FIN. (1999).

¹⁹⁴ Lee, *supra* note 160, at 356.

its intent.¹⁹⁵ Others find the *Moghadam* ruling sound.¹⁹⁶ Though the court managed to traverse the sticky legal quagmire and rendered a decision that seemed to balance public policy against the stringent requirements of Constitution and precedent, the ultimate issue raised by both parties in *Moghadam* (i.e. the constitutionality of section 1101 under the Copyright Clause) was not affirmatively settled.¹⁹⁷ For the moment, everyone is happy, with the obvious exception of Ali Moghadam. The music and recording industry has a means for protecting its revenue; artists have a means of curbing public distribution of unauthorized recordings of their musical performances; and the courts still have a hold on two hundred years worth of copyright jurisprudence. The United States Supreme Court denied *certiorari* for the *Moghadam* case, perhaps content to let the decision stand.

V. THAT'S ME IN THE SPOTLIGHT:¹⁹⁸ PERSPECTIVES ON BOOTLEGGING

While the legal environment progressed from one lacking in protection for sound recordings to one characterized by stringent penalties for infringers and unauthorized recorders, the music industry currently faces a business reality that can only be described as grim. For around a hundred years, major record labels ran a bricks and mortar type business i.e. one built on piece by piece sales. From vinyl to eight track to cassette to compact disc, the industry has financed musical careers and artistry through mass marketing to music fans and collectors. With the proliferation of online piracy in the last few year, record sales have declined, even for very popular albums. The latest U2 album sold only around a million copies, even though it included two songs nominated for Grammy awards and the band performed music from it at last year's Super Bowl.¹⁹⁹ Red Hot Chili

¹⁹⁵ See 3 Nimmer on Copyright, *supra* note 170, § 8E.01(C), at 8E-8 (noting that Congress' passage of the anti-bootlegging statute under the authority of the Commerce Clause raises the question of whether there is any amendment to copyright law that Congress could not make under its broad commerce powers); Nimmer *supra* note 130, at 1409, 1411 (wondering if legislators in Washington considered at all the constitutional grounds for the enactment of the anti-bootlegging statute). But see Lionel S. Sobel, *Bootleggers Beware Copyright Law Now Protects Live Musical Performances But New Law Leaves Many Questions Unanswered*, 17 No. 2 ENT. L. REP. 6, at 11-12 (1995) (applauding willingness of Congress to provide copyright protection for all sorts of unfixed works by way of the Commerce Clause) "[R]eliance on the [C]ommerce [C]ause to amend the Copyright Act opens the door to all types of additional amendments . . . thought to be beyond the reach of copyright law." *Id.* at 12.

¹⁹⁶ See Lee, *supra* note 160, at 361-62 (approving the Moghadam opinion).

¹⁹⁷ Lee, *supra* note 160, at 361.

¹⁹⁸ R.E.M., *Losing My Religion*, OUT OF TIME (Warner Bros. Records 1991).

¹⁹⁹ Interview with Edward P. Pierson, Exec. V.P./Legal & Bus. Affairs, Warner Chappell Music, Inc., and Bertis Downs, R.E.M. counsel, in Athens, Ga. (Oct. 9, 2002).

Peppers' latest effort, which features several popular singles, to date has sold about three million copies though the band is popular worldwide.²⁰⁰ The music industry faces a reality of fewer pieces sold, and must find a way to compete with free online music distribution to replenish the coffers that sponsor artists and recordings and to protect artists' intellectual property rights.

Not surprisingly, perspectives on the bootlegging issue among artists, industry officials, and entertainment attorneys range from staunch disapproval, to acquiescence, to open allowance of taping. The music industry is realizing that even with federal legislation on its side, bootlegging is here to stay. Though the music industry is beginning to take steps toward using the demand for bootlegs to its advantage, major record companies and their trade organization maintain a hardline stance against the practice of recording musical performances without the permission of the artist, especially when those unauthorized recordings are sold for profit.

A. THE RIAA: TEMPERANCE UNION OF THE MUSIC INDUSTRY

The RIAA divides music piracy into four categories.²⁰¹ It regards all forms of music piracy as stealing, plain and simple.²⁰²

To all artists, 'copyright' is more than a term of intellectual property law that prohibits the unauthorized duplication, performance or distribution of a creative work. To them, 'copyright' means the chance to hone their craft, experiment, create, and thrive . . . [b]efore free speech, before freedom of assembly, before freedom of religion, there was copyright protection in our Constitution . . . [t]he principle that work one creates belongs to the creator and should be controlled by the creator is as timeless as it is global.²⁰³

The RIAA represents ninety percent of all legitimate sound recordings produced in the United States and employs a team of investigators to uncover piracy operations throughout the world.²⁰⁴ Frank Creighton, RIAA senior vice president and director of anti-piracy, says the team has stepped up efforts to reduce the growth of CD-R piracy in particular by encouraging the assistance of

²⁰⁰ *Id.*

²⁰¹ See *supra* notes 6-31 and accompanying text (explaining the main forms of music piracy).

²⁰² What is Piracy?, *supra* note 14.

²⁰³ *Id.*

²⁰⁴ RIAA Releases Mid-Year Anti-Piracy Statistics, at http://www.riaa.com/News_Story.cfm?id=457 (last visited Sept. 24, 2002).

law enforcement as well as consumers in the private sector.²⁰⁵ “We recognize that in order to keep up with the expanding CD-R piracy problem, we need to work hand in hand with those charged with enforcing Intellectual Property laws and those hurt most by sound recording piracy.”²⁰⁶ In the last year, the RIAA and its member record companies have engaged in significant efforts at educating retailers and the public about illegitimate sound recordings and ways that unauthorized CDs can be spotted and reported.²⁰⁷ Training programs for federal, state, and local authorities have also been expanded to ensure that officials can identify piracy activities and deal with them at the local level without requiring an RIAA investigator at the site.²⁰⁸

These efforts seem to have paid off in 2001 as record numbers of arrests, unauthorized material seizures, and convictions were reported in the RIAA’s anti-piracy statistics for the first half of the year.²⁰⁹ The Anti-Piracy Unit was involved in the confiscation of 1,257,796 illicit CD-Rs during that time.²¹⁰ This marks an increase of one hundred thirty-three percent over the number of CD-Rs seized over the same time period in 2000.²¹¹ Search warrants were executed at seventy-two illegal distribution sites and thirty-four manufacturing operations in the first half of 2001, resulting in seizure of 604 CD burners.²¹² The RIAA reports that this number is about the same as the number of CD burners confiscated for the entire year in 2000.²¹³ There were 1,762 arrests of individuals for trafficking in illegal CDs or CD-Rs in the first six months of 2001, an eighty-nine percent increase over the 932 arrests over the same time period in 2000.²¹⁴

These numbers demonstrate the success of the RIAA in reducing the number of illegal CD-Rs on the market in recent months, especially when compared with their seizure of eighty-seven illegal CD-Rs during the first six months of 1997; 23,858 during the same period of 1998; and 165,981 for the first half of 1999.²¹⁵ It is important to remember that these statistics include pirated and counterfeit recordings and are not entirely attributable to the seizure of illicit live bootlegs.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ RIAA Releases Mid-Year Anti-Piracy Statistics, at http://www.riaa.com/News_Story.cfm?id=457 (last visited Sept. 24, 2002).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ RIAA Releases Mid-Year Anti-Piracy Statistics, at http://www.riaa.com/News_Story.cfm?id=457 (last visited Sept. 24, 2002).

²¹⁵ CD-R Piracy, at <http://www.riaa.com/Protect-CDR.cfm> (last visited Sept. 16, 2002).

The RIAA does not discriminate in its efforts to curb piracy. The Anti-Piracy Unit targets illicit CD reproduction facilities with as much tenacity as possible:

CD fraud on a massive scale is too great a temptation for some pirates [Pirates] place an illegal order at a CD mastering or manufacturing plant. Often the request comes to transfer music from digital audiotape (DAT) or CD-R to CD. The competition in the CD replication industry is intense, to the point that some plant personnel do not check orders as carefully as they should. Soon, thousands of illegal counterfeited discs are on the shipping dock.

U.S. copyright law provides for strict liability for copyright infringement. If a CD plant presses an illegal disc, the plant is liable. Ignorance is no excuse.²¹⁶

A recent decision finding the president of a California CD manufacturing facility liable for copyright infringement because the facility pressed illicit CDs demonstrates this hardline stance. The RIAA received summary judgment against Media Group, a CD manufacturing plant, and its president for copyright infringement.²¹⁷ The District Court for the Central District of California deemed all defendants to be willful infringers and determined that Media Group's president was liable for vicarious and contributory infringement.²¹⁸ The defendants were found liable for infringement of 1,547 works owned by RIAA members since 1995.²¹⁹

According to the RIAA, one of the reasons for the decision was the fact that Media Group had been involved in the RIAA's anti-piracy education program, and failed to take it seriously.²²⁰

Among the artists whose works were illicitly reproduced by Media Group were James Brown, Madonna, and Elvis Presley.²²¹ Frank Creighton points out that the training efforts aimed at CD replicator employees were specifically meant to allow replicators to limit any possible liability if they filled an order for a music pirate.²²²

²¹⁶ A Miracle Easily Replicated, at <http://www.riaa.com/Protect-Plant-1.cfm> (last visited Sept. 16, 2002).

²¹⁷ Media Group Found Guilty of Copyright Infringement, at http://www.riaa.com/News_Story.cfm?id=445 (last visited Oct. 10, 2001).

218 *Id.*

219 *Id.*

220 *Id.*

221 *Id.*

²²² Media Group Found Guilty of Copyright Infringement, at http://www.riaa.com/News_Story/cfm?id=445 (last visited Oct. 10, 2001).

The RIAA also encourages the public to get involved in its fight against piracy. In August, 1999, it announced its CD-Reward program.²²³ This initiative offers monetary rewards of as much as \$10,000 to any individual who tips off the RIAA regarding illegal reproduction of member sound recordings.²²⁴ The RIAA states that persons reporting illicit replication facilities may remain anonymous unless a government agency requests their identity or a court of law subpoenas for it.²²⁵

The RIAA actively seeks to assist local law enforcement officials in investigating and prosecuting music pirates. Some very recent operations included the seizure of 13,095 illegal sound recordings, which led to a fourteen month period of incarceration and a \$65,475 judgment in restitution to the RIAA by the suspect who was convicted of criminal copyright infringement in Maryland.²²⁶ In New York, 13,000 pirated CD-Rs by musicians such as Usher and Natalie Cole were seized in a combined effort by the New York Police Department's Organized Crime Investigation Division and the RIAA's New York Anti-Piracy Unit.²²⁷ Two people face charges of Failure to Disclose the Origin of a Sound Recording as a result of the arrests.²²⁸

A record store employee pled guilty for manufacturing CD-Rs for sale in a store in Garland, Texas after a search warrant execution by the Texas Department of Public Safety and the RIAA's Texas Anti-Piracy unit uncovered 373 pirate CD-Rs.²²⁹ In Nashville, Tennessee, an ordinary traffic stop resulted in the seizure of 347 counterfeit cassettes and 985 counterfeit CD-Rs.²³⁰

In response to the expansion of Latin music piracy that was an inevitable by-product of the explosion of Latin music in the last three years, the RIAA devotes about seventy percent of its non-Internet related investigatory work to uncovering Latin music piracy.²³¹ Half of all illegal sound recordings confiscated in 1998 and the first six months of 1999 were in the Latin genre. Most of these were in cassette form.²³² The RIAA opened an office in Miami in July 1998 to serve the

²²³ Up to \$10,000 in Reward, at <http://www.riaa.com/Protect-Report.cfm> (last visited Oct. 8, 2001).

²²⁴ *Id.* The RIAA offers a toll-free hotline at 1-888-BAD-Beat and e-mail tip mailboxes at cdreward@riaa.com and on its website at www.CDReward.com. *Id.*

²²⁵ *Id.*

²²⁶ Recording Industry Helps Local Law Enforcement Uncover Illegal Music Operations, at http://www.riaa.com/News_Story.cfm?id=453 (last visited Oct. 10, 2001).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Latin Music Piracy, at <http://www.riaa.com/Protect-Latin.cfm> (last visited Oct. 8, 2001).

²³² *Id.*

American Latin music industry and to assist local law enforcement in anti-piracy efforts.²³³

The RIAA also pushes for the enactment of state legislation to combat music piracy. The California Optical Disc Identifier Act was enacted in 1998 and directly aids in the reduction of piracy by requiring CD, CD-R, and DVD manufacturers to identify products with the name and home state of the manufacturer.²³⁴ Similar legislation has been passed in Florida and New York.²³⁵

B. THERE'S SOMETHING GOING ON THAT'S NOT QUITE RIGHT²³⁶

Many artists have no patience with the practice of bootlegging and piracy in general. In some instances, their outspoken opposition is probably the result of their record company's stance on the issue. Paul McCartney of the Beatles once told a journalist that he had no problem with bootlegs but "every time I say that, my lawyer says, 'Oh yes you do.'"²³⁷

It is no wonder. The Beatles' performances are captured on 186 known bootlegs, while Prince appears on 180 bootlegs.²³⁸ The Rolling Stones are on 167 bootlegs, and U2 performs on 149.²³⁹ Other artists whose performances are popular among music collectors include all-time favorites Bruce Springsteen, Led Zeppelin, Bob Dylan, and newer choices of Pearl Jam, U2, Phish, Nirvana, and the Dave Matthews Band.²⁴⁰

The Dave Matthews Band maintained an open-taping policy at its shows as late as 1999.²⁴¹ Like many artists, band leader Dave Matthews draws a clear distinction in his mind between fan-taping and free trading of shows, on one hand, and commercial bootlegging, on the other:

[W]hen somebody who doesn't . . . [care] about the music or about the fans comes in and makes 500,000 copies of a show and gives it

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* These enactments are "true name and address" statutes. See *supra* note 135 and accompanying text (discussing state "true name and address" laws).

²³⁶ R.E.M., *Strange*, DOCUMENT (IRS Records, 1987).

²³⁷ Allan Kozinn, *Bootlegging as a Public Service: No, This Isn't a Joke*, N.Y. TIMES, Oct. 8, 1997, available at 1997 WL 8006586.

²³⁸ Nick Varley, 'Garden Shed' at Hub of CD Pirates' Huge Bootleg Racket: Nick Varley on a Multi-Million Pound Fraud, GUARDIAN, Oct. 19, 1996, available at 1996 WL 13382261.

²³⁹ *Id.*

²⁴⁰ Kenneth Lovett, *Bootlegged in the U.S.A.: Artists Battle Illicit CD Boom*, RECORD, July 15, 1999, available at 1999 WL 7107402.

²⁴¹ Roger Catlin, *Matthews Pacifies Fans with Some Live Stock*, RECORD, Feb. 22, 1999, available at 1999 WL 7090293.

a weird name and misnames all the songs because nothing matters, and then puts out a bad recording with the voices of . . . five drunk guys screaming louder than the music and then charges you \$80 for it, there's something about that that's a little . . . "irritating".²⁴²

The band employs a lawyer named Jules D. Zalon, who is well known for reducing the sale of counterfeit T-shirts for artists like Michael Jackson and Hootie and the Blowfish, to confiscate bootleg recordings offered for sale at independent record stores.²⁴³ Zalon hit record retailers in Rhode Island, Massachusetts, New Jersey, and Connecticut by sending representatives into the stores to purchase bootleg albums.²⁴⁴ After the purchases were complete, Zalon entered each store accompanied by a federal marshal, seized any remaining bootlegs by Dave Matthews Band, and threatened a \$100,000 law suit for every illegal CD.²⁴⁵ The last step in Zalon's assault on the sale of bootleg recordings was handing over a letter asking for \$10,000 to \$15,000 for the costs of the investigation as an out-of-court settlement.²⁴⁶

In another example of a zero tolerance approach to bootlegging, the British heavy metal band Saxon received an interlocutory injunction against Rainbow Communications Ltd. to temporarily enjoin the release of an album of their recordings in the U.K.'s Chancery Division in 1995.²⁴⁷ Rainbow was a brand new record company that planned its inception around the release of the live Saxon performance from 1980's Castle Donington Music Festival.²⁴⁸ The company received the recording from one of the band members who was booted (no pun intended) from the band soon after he gave Rainbow the recording.²⁴⁹

According to the band's lead singer, the group did not give permission for the 1980 show to be recorded and the recording thus violated his rights under the United Kingdom's Performance Protection Act.²⁵⁰ The judge determined that the band had given consent in 1980 for the recording of only two songs to appear on a compilation album from the festival and that because Saxon was about to

²⁴² *Id.*

²⁴³ Neil Strauss, *The Pop Life*, N.Y. TIMES, Apr. 23, 1997, available at 1997 WL 7994221.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *British Court Grants Injunction Temporarily Barring Release of Recording by "Saxon" Allegedly "Bootlegged" in 1980 While the Band Was Performing at Castle Donington Music Festival* (No. 8), 17 ENT. L. REP. 20 (1996).

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

release a new album, its sales and the reputation of the band might suffer from any release of the 1980 recordings.²⁵¹

C. IN AN EASY CHAIR WITH MY BOOTS ON²⁵²

Eddie Vedder of Pearl Jam happened to notice a bootlegger taping one of his band's concerts in Stockholm, Sweden in 1992 and responded with the following: "[t]his guy's making a tape recording, everybody be careful, don't make too much noise. No, keep it out, I like that idea. He's O.K. . . . right? He can tape it"²⁵³

Other bands such as the Grateful Dead, Black Crowes, Metallica, and Page and Plant allowed fans to tape their performances.²⁵⁴ Pearl Jam was the most-bootlegged group in 1995, having done several worldwide broadcasts that no doubt contributed to the large number of Pearl Jam bootlegs on the market.²⁵⁵ In 2000 the band decided to take action against the bootleggers and had each show on its tour professionally recorded. The band then released all the shows as "official bootlegs."²⁵⁶ These live recordings totaled twenty-five and were released simultaneously on September 25, 2000.²⁵⁷ Eddie Vedder remarked of the band's release of the twenty-five live performances: "[a] lot of people out there buy bootlegs, and it's risky because you can spend a lot of money and get a very poor-quality recording."²⁵⁸

Bruce Springsteen was happy to have people tape his concerts in the early years of his career because the recordings increased his popularity and thereby the market for his music, but in later years he was more inclined to sue for copyright infringement.²⁵⁹ Bob Dylan also complained about bootleggers though, ironically, "Great White Wonder" was the first known rock bootleg.²⁶⁰

²⁵¹ *Id.*

²⁵² Widespread Panic, *Chilly Water*, SPACE WRANGLER (Capricorn Records 1991).

²⁵³ Mark Brown, *Bootlegging and Tape-trading of Unreleased and Live Tracks Is Exploding: Fans Want These Unauthorized Recordings, but Is the Trend Hurting the Artists They Love?*, ORANGE COUNTY REG., Mar. 19, 1995, available at 1995 WL 5840197.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ Mark Brown, *Sound Investment: Concert Tapers Help Make Music History*, DENVER ROCKY MOUNTAIN NEWS, Oct. 22, 2000, available at 2000 WL 6610824.

²⁵⁷ Adam Sweeting, *Stolen Moments: Pearl Jam are releasing 25 Live Albums at Once to Protect Fans from Poor Quality Bootlegs*, GUARDIAN, Sept. 22, 2000, available at 2000 WL 27020661.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* See also Patterson, *supra* note 2 (discussing the availability of "Great White Wonder").

D. I HOPE SOMEONE WITH A TAPE MACHINE HAD THE SENSE TO RECORD THIS²⁶¹

Some bands openly permit taping of their performances with the hope that fans will recognize that taping is a privilege and only engage in free trading of shows without crossing the line into commercial bootlegging. Examples of these very tolerant bands include improvisational rockers Widespread Panic, the now defunct touring apparatus Phish, and the psychedelic band The Grateful Dead.²⁶² These bands see tapers as helping to disseminate their music on a broad scale without the costs associated with the release of commercial albums, and also as creating a strong connection with fans that fosters their success in the competitive music industry.²⁶³

Phish grossed upwards of ten million dollars in annual ticket sales while selling only a few hundred thousand copies of their albums each year. The band credits that fact to their policy of allowing fans to tape shows since the band's inception in Vermont in 1984.²⁶⁴ According to one of the editors of "The Phisherman's Almanac," a touring companion for the band's fans, "without taping there would be no Phish . . . It's the most important element of the Phish phenomenon. You can only go see the band so many times a year, but it's the tape that you can enjoy over and over again . . . The story of Phish is how bootleg tapes created the popularity of a band."²⁶⁵

According to band spokesman Dennis McNally, the Grateful Dead allowed taping because they knew they could not stop it.²⁶⁶ The band made clear its desire that the tapes be traded freely and not sold for profit, and McNally says that is just what happened most of the time.²⁶⁷ The Grateful Dead was one of the country's biggest concert attractions for years before the group disbanded after the death of front man Jerry Garcia in 1995.²⁶⁸ McNally says that the Grateful Dead trusted their audience and that trust really influenced the fans.²⁶⁹

Another band that exhibits trust in its audience is Widespread Panic. David Schools, the band's bassist, discovered The Grateful Dead by trading tapes and acknowledges that open-taping and fan tape-trading facilitated the growing popularity of his own band years later:

²⁶¹ Jeri Rowe, *Messengers of Music*, GREENSBORO NEWS & REC., Nov. 16, 1997.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Rowe, *supra* note 261.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

I remember there was one time when we had not been farther West than the Mississippi River . . . [W]e were performing in San Francisco, and we figured that people would be unfamiliar with our music, and they weren't. I looked out there and they were singing every word, and that was incredible . . . [j]ust the grapevine procedure of tapes. Right then it sort of clicked that this is definitely not a bad thing.²⁷⁰

Like many artists who allow the audience to record their concerts, Schools is careful to distinguish free tape trading from commercial bootlegging: "Bootlegging is a bad thing . . . [s]elling a record at an incredible price, slapping on an imported sticker and finding some sorority sister to buy [bad]-sounding Dave Matthews album."²⁷¹

Even a few bands who could not be said to benefit in any way from informal distribution and popularization of their music have no real problem with bootlegging. Bertis Downs, III, Esq., counsel for R.E.M., *who are* undoubtedly one of the most popular and influential rock bands on the planet, says the band has always treated bootlegs with "benign neglect"²⁷² because most of the people who own or collect bootlegs generally own all the band's legitimate recordings anyway.²⁷³ Besides, as Downs observes, there are "bigger [sic] more dangerous fish" for the music industry to fry, fish that "actually might cannibalize legitimate sales."²⁷⁴ In the short time that has transpired between the composition of Downs' e-mail and the publication of this Note, it seems that his statement regarding the potential cannibalization of legitimate record sales has become a pale understatement. The advent of MP3 technology and the increase of online piracy pose tremendous threats to authorized record sales, and those threats grew to fruition in 2001 and the first half of 2002. Each time a file-sharing site is enjoined from facilitating the infringement of copyrighted music (e.g., Napster and Audiogalaxy), a half dozen new sites crop up to fill the gap. According to Downs, file sharing via the Internet "calls into question the very ability of artists . . . to build a career through record sales."²⁷⁵

²⁷⁰ *Id.*

²⁷¹ Rowe, *supra* note 261.

²⁷² E-mail from Bertis Downs, III, Counsel, R.E.M., to Dawn Maynor, Second-year law student, University of Georgia School of Law (Nov. 21, 2001) (on file with author). The author gratefully acknowledges the guidance of Bertis Downs III, Esq. in the composition of this Note, as well as the direction and support provided by Jason Lewis, Chris Thomas, Katie Bindles, Gracie Waldrup, and the esteemed L. Ray Patterson.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

VI. THESE BOOTS ARE MADE FOR WALKIN²⁷⁶

In the years since the adoption of the URAA and the resulting anti-bootlegging statute, the music industry has slowly opened its eyes to the reality of the huge and sustained demand for music bootlegs. After a few artists like Bob Dylan,²⁷⁷ Frank Zappa,²⁷⁸ and Led Zeppelin²⁷⁹ gave in and bootlegged themselves, other popular musicians and their record companies followed suit. It is not very surprising that these authorized releases have had a huge success in terms of sales, because discerning music fans take their devotion seriously and tend to gorge themselves on their favorite artists' sound. Capitol Records, after years and years of witnessing tremendous demand for Beatles bootlegs, released a two-CD set of tracks that the band had cut off previous albums, which sold a million copies within a few months of its release.²⁸⁰ Dave Matthews Band released a double live album called "Live at Luther College" in 1999 that filled a spot on the Top 20 chart for weeks.²⁸¹ The band had similar success with a live recording from Morrison, Colorado's Red Rocks amphitheater that was issued in 1997 while the band was working on a new studio album.²⁸²

More recently, Pearl Jam took the notion of using bootlegging to the artist's advantage a step further by releasing every show on its 2000 tour on what amounts to sanctioned bootlegs. The simultaneous release of twenty-five live albums with perfect sound quality has been quite successful in garnering public support and preventing the sale of any unauthorized recordings from the tour.²⁸³ Remarkably, five of the albums debuted in the Top 200 chart and, not surprisingly, you cannot find any unauthorized bootleg from the tour even in the smallest of record stores.²⁸⁴ The potential use of this type of strategy by very popular artists seems endless. Certainly the future will bring more sanctioned live

²⁷⁶ Nancy Sinatra, *These Boots Are Made for Walkin'*, BOOTS (Reprise Records 1977).

²⁷⁷ Mark Brown, *BOOTLEG PIRATES//MUSIC: Bootlegging and tape-trading of unreleased and live tracks is exploding. Fans want these unauthorized recordings, but is the trend hurting the artists they love?*, ORANGE COUNTY REG., Mar. 19, 1995, available at 1995 WL 5840197. Bob Dylan released "The Basement Tapes" in 1975, his sanctioned version of "Great White Wonder." *Id.* Dylan also issued "Bootleg Series, Vols. 1-3." *Id.*

²⁷⁸ *Id.* Frank Zappa released a series of albums called "Beat the Boots." *Id.*

²⁷⁹ *Id.* Led Zeppelin included bootlegged tracks in the CD box set it issued in 1991. *Id.*

²⁸⁰ Jon Pareles, *Bootleggers: Unsung Heroes of Music?*, NEW ORLEANS TIMES-PICAYUNE, Dec. 22, 1995, available at 1995 WL 13252540.

²⁸¹ Roger Catlin, *Matthews Pacifies Fans with Some Live Stock*, REC., NORTHERN N.J., Feb. 22, 1999, available at 1999 WL 7090293.

²⁸² *Id.*

²⁸³ Mark Brown, *Sound Investment: Concert Tapers Help Make Music History*, DENVER ROCKY MOUNTAIN NEWS, Oct. 22, 2000, available at 2000 WL 6610824.

²⁸⁴ *Id.*

releases and simultaneous live releases as the music industry continues to accept and even embrace bootlegging.

Major labels should consider producing commercial live recordings and offering particular shows or compilations of live material from a series of shows for popular artists. It goes without saying that the sound quality should be superb, a clear advantage over poorer quality audience recordings. These official "bootlegs" should also come with unique graphics or rare photographs of the act to augment the appeal to the urge to collect in devoted music fans. Finally, these releases, whether simultaneous tour recordings or individual live offerings, should be very affordable to clinch the sale to the music collector. Pearl Jam, through their label, achieved price reasonability by offering their series of "bootlegs" for around five dollars if ordered from the band's website, or about seven dollars in record stores.

Though there will always be diehard bootleg collectors who feel that an "official bootleg" violates the spirit of "classic" bootlegging and will continue to seek out copies of audience-recorded shows, most music fans would likely prefer to have a recording with superior sound fidelity and unusual graphics or photographs to add to their collections. Record labels could further benefit from releasing their sanctioned live records on enhanced CDs that include concert footage, interviews, or even cartoons of the artist or band, which would be available to the purchaser when he or she put the CD into a computer.

Another important strategy that the industry should employ, and one that will prove advantageous to less popular musicians, is an open-taping policy at concerts. This idea may at first seem counterintuitive, but if fan taping (and resulting free trading) can lead to touring success for bands like Phish and Widespread Panic, there is no reason why it cannot do the same for other acts. By allowing taping, a band sends a message of trust to its audience. The Grateful Dead always allowed fans to record their shows, and thereby built a strong relationship with a particular group of people. By utilizing the taping policy and other alternative marketing strategies, the band built a huge merchandise and distribution business that still generates upwards of sixty million dollars each year.²⁸⁵ Surely their decision to allow taping seemed absurd in a time when most of the music industry was battling the bootleg problem, but their success proves that open taping can turn out to be a really good idea.

Obviously, an open-taping policy will not just mean that loyal fans who intend to trade the recordings freely will tape the shows. There is no guarantee that a commercial bootlegger will not be there to plug in his deck too. But just as surely

²⁸⁵ Brian C. Drobniak, *Truckin' in Style Along the Avenue: How the Grateful Dead Turned Alternative Business and Legal Strategies Into a Great American Success Story*, 2 VAND. J. ENT. L. & PRAC. 242, 251 (2000).

as that will happen, artists can trust some fan to get a copy of any commercial bootleg that ends up on the market, burn copies onto CD-R, and distribute those copies for free through bootleg trading networks. That's right, fans are actually bootlegging the bootleggers. When commercial bootleggers release a new product, in no time at all it is duplicated and traded for free.²⁸⁶ Legitimate tapers pride themselves on archiving shows for the annals of music history, and shun any taper who tries to sell recordings.²⁸⁷ The Internet gives fans worldwide access to all the bootlegs they could ever want.²⁸⁸ Therefore, an open-taping policy may not only popularize a band's music and beat the commercial bootleggers at their own game, but can also prove to bolster tremendous financial success from touring for those acts willing to spend much of the year on the road.

Finally, the sale of official "bootlegs," increase in fan loyalty, and the potential for inflated tour revenues may alleviate the economic losses the industry is feeling as a result of massive online piracy. Where hit albums in the past could sell upwards of a million copies, the twenty-first century is more characterized by a few people uploading a hit album that soon results in the free distribution of upwards of a million copies. And while it is just as likely that any sanctioned live releases will be uploaded and potentially copied in the same manner, record labels should flex their marketing muscles and work to appeal to music collectors and loyal fans. Though many people who infringe copyrights by downloading music from the Internet justify their actions by pointing to "fat cat" label executives and wealthy artists, the avid music collector or true fan would likely respond to manifestations of trust and unselfishness on the part of labels and artists. Some artists who allow taping have figured this out for themselves, and the overall industry could really benefit if more musicians and record companies adopt this policy. Though traditionally, popular musicians enjoyed four sources of revenue to support their careers (i.e. record sales, touring, publishing, and merchandise/ancillary sales), the onslaught of online piracy in the last several years has seriously called into question the most important of these sources of revenue: record sales. As the industry scrambles to build a "celestial jukebox" that can compete with free online distribution, it seems that it would do well to make every effort to bolster the sources of revenue that remain viable.

United Kingdom attorney Colin Davis, who handles bootlegging cases for the British Phonograph Industry, observes that bootlegging can be very favorable by noting that many of the bard's great plays are unauthorized scripts: "It's quite possible that William Shakespeare thought that Richard III was a rather embarrassing piece of Tudor propaganda that he should never have put his name

²⁸⁶ Brown, *supra* note 283.

²⁸⁷ *Id.*

²⁸⁸ See, e.g., alt.music.bootlegs (listing bootlegs accessible to fans).

to.’ ”²⁸⁹ As the music industry blinks in the bright and rude awakening of the destruction of its business model, it should embrace any strategy that might foster consumer loyalty and offset the draining of its revenues by online piracy. Otherwise, the words of Nancy Sinatra will ring ominously true as online piracy becomes more menacing, leaving behind a pale shadow of the music business as it used to be: “one of these days these boots are gonna walk all over you.”²⁹⁰

DAWN R. MAYNOR

²⁸⁹ Gabe Stewart, *Original Sin: They Have it on Tape: Anti-Piracy Chief Dave Martin Says the Number of Bootlegging Prosecutions is Minimal Compared to Those for Counterfeiting*, HERALD (U.K.), May 1, 1999, available at 1999 WL 17021832.

²⁹⁰ Nancy Sinatra, *supra* note 276.

